

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/15/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2002-000419

FILED: _____

STATE OF ARIZONA

KAREN B KEMPER

v.

SCOTT L ANDRES

NEAL W BASSETT

REMAND DESK CR-CCC
SOUTH MESA-GILBERT JUSTICE
COURT

MINUTE ENTRY

SOUTH MESA/GILBERT JUSTICE COURT

Cit. No. #TR02-00882-CR

This case is before the Court on a Petition for Review of the denial of Defendant, Scott L. Andres' Petition for Post-Conviction Relief, filed pursuant to Rule 32, Arizona Rules of Criminal Procedure. This Court has considered and reviewed the record of the proceedings from the South Mesa/Gilbert Justice Court and the memoranda filed with the trial court and with this court.

The only issue presented by Defendant Andres is that the lower court erred in denying his Petition for Post-Conviction Relief because Andres was not informed of his right to a jury trial prior to the acceptance of his guilty plea to the charge

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of Aggressive Driving, in violation of A.R.S. Section 28-695. Both parties agree that the lower court record reflects that the Defendant was not advised of his right to a jury trial, nor did he waive his right to a jury trial. The State of Arizona contests Andres' position that he is entitled to a jury trial for the crime of Aggressive Driving.

This appears to be a case of first impression involving A.R.S. Section 28-695. This Court was unable to discover any reported cases in Arizona dealing with the issue of the right to jury trial to persons charged with Aggressive Driving.

The Federal law is not helpful in regard to this issue. The United States Constitution requires that if a crime is punishable by more than six (6) months of incarceration, it is not a petty offense and the accused must be afforded the right to a jury trial.¹

Arizona has in fact, extended the right of a jury trial much further than that guaranteed by the United State Constitution.² The Arizona Supreme Court in McDougall³, listed four factors to evaluate in determining the right to a jury trial in the State of Arizona. The first three factors are found in Rothweiler v. Superior Court⁴:

1. The length of possible incarceration;
2. The moral quality of the act charges (sometimes referred to as the "moral turpitude" issue;
3. Its relationship to common law crimes.

¹ Lewis v. United States, 518 U.S. 322, 116 S.Ct. 2163, 135, L.Ed.2d 590 (1996); Blanton v. North Las Vegas, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).

² State v. ex rel. McDougall v. Strohson, 190 Ariz. 120, 945 P.2d 1251 (1997).

³ Id.

⁴ 100 Ariz. 137, 410 P.2d 479 (1996).

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The fourth consideration comes from State ex rel. Dean v. Dolny⁵ and requires that the Court evaluate whether additional serious or grave consequences might flow from the conviction.

The length of possible incarceration in this case is six (6) months imprisonment; the maximum possible sentence for all class 1 misdemeanors. This factor is not controlling as Defendants charged for other class 1 misdemeanors such as assault or disorderly conduct are not entitled to trials by jury.⁶

Defendant cites Urs v. Maricopa County Attorney's Office⁷ for the proposition that a Defendant is entitled to a jury trial for the crime of Reckless Driving, and that crime's elements are not distinguishable from Aggressive Driving. The Court of Appeals conclusion in Urs V. Maricopa County Attorney's Office was based upon that court's construction of the ruling in District of Columbia v. Colts⁸ wherein the United States Supreme Court found that Colts was entitled to a jury trial because the crime of Reckless Driving was traceable to the common law crime of Public Nuisance.⁹ The Court of Appeals in Urs concluded:

We decide that driving a vehicle "in reckless disregard for the safety of persons or property," in violation of A.R.S. Section 28-693(A)("reckless driving"), is in the character of operating a motor vehicle so "as to endanger [any] property [or] individual" a jury-eligible offense at common law (citations omitted). Consequently, Urs is guaranteed a jury trial by Article II, Sections 23 and 24 of our Constitution.

⁵ 161 Ariz. 297, 778 P.2d 1193 (1989).

⁶ Goldman v. Kautz, 111 Ariz. 431, 531 P.2d 1138 (1975); Bruce v. State, 126 Ariz. 271, 614 P.2d 813 (1980); O'Neill v. Mangum, 103 Ariz. 484, 445 P.2d 843 (1968).

⁷ 201, Ariz. 71, 31 P.3d 845 (App. 2001).

⁸ 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed.177 (1930).

⁹ 201 Ariz. at 73, 31 P.3d at 847.

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The crime of Aggressive Driving is a more serious offense (a class 1 misdemeanor) than the offense of Reckless Driving (a class 2 misdemeanor for a first offense). The two crimes share many of the same elements, and differ by the requirement in the requirement of Aggressive Driving that a person's driving be "an immediate hazard to another person's vehicle" and a speeding violation in addition to two additional specified traffic violations.

In a footnote to the Urs opinion, the Arizona Court of Appeals explained that the moral character of the offense of Reckless Driving clearly qualified it as a common law crime for which Urs was entitled to a jury trial:

"Indictable Offenses" at common law were jury-eligible crimes (citation omitted). An automobile, potentially, a dangerous instrumentality as the appalling number of fatalities brought about everyday by its operation bear distressing witness. To drive such an instrumentality through the public streets so recklessly "as to endanger property and individuals" is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense. Such an act properly cannot be described otherwise than as a grave offense- - a crime within the meaning of the Third Article of the Constitution- - and as such within the Constitutional guarantee of trial by jury.¹⁰

This Court is not able to distinguish the Court of Appeals' reasoning from the facts presented by the instant case. This Court, therefore, concludes that the crime of Aggressive Driving in violation of A.R.S. Section 28-695 which includes the element that a "person's driving is an immediate hazard to another

¹⁰ Id., 201 Ariz. at 73, 31 P.3d at 847, footnote 3.

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person or vehicle" is a crime traceable to the common law offense of Public Nuisance. Aggressive Driving is also a crime of such obvious depravity that to characterize it as a petty offense would be shocking to the public's moral sense. Clearly, the Defendant who is charged with Aggressive Driving is entitled to a jury trial. The trial court erred in failing to inform the Petitioner/Defendant herein of his right to a jury trial. And, in the absence of a voluntary, intelligent and knowing waiver of the right to a jury trial, this Court cannot conclude that Andres' guilty plea was made with sufficient awareness of his rights and the consequences of his guilty plea.¹¹ The trial judge erred in denying Andres' Petition for Post-Conviction Relief.

IT IS THEREFORE ORDERD granting the Petition for Review.

IT IS FURTHER ORDERED vacating Defendant Andres' guilty plea, conviction and sentence for the charge of Aggressive Driving.

IT IS FURTHER ORDERED remanding this case back to the South Mesa/Gilbert Justice Court for all further and future proceedings in this case, including setting this matter for trial.

/S/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

¹¹ State v. Crowder, 155 Ariz. 477, 747 P.2d 1176 (1987).
Docket Code 512